

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

KENNETH FORTUNE,)
Plaintiff,) Civil Action No. 04 - 377
v.)
Unit Manager, CARL HAMBER; Superintendent)
MARTIN L. DRAGOVICH; THOMAS L. JAMES,)
Chief Grievance Coordinator; C.O. BASEMORE,)
Guard; Hearing Examiner CAROL BAKER; C.O.)
LITCHARD, Guard; Sergent C.O. WIRT; Sergent)
C.O. HARMON; Unite Manager, ROBERT)
STEVENS; Accountant KAREN PATTERSON;)
Business Manager JEAN W. SCOTT;)
Superintendent DONALD L. KECHNER; and C.O.)
CRAIG, Guard,)
Defendants.)
Judge Terrence F. McVerry /
Magistrate Judge Lisa Pupo
Lenihan

ORDER

Pending before the Court are two motions filed by Plaintiff, a Motion for Contempt (Doc. No. 32) and a Motion for Writ of Mandamus (Doc. No. 33). Both motions will be denied by the Court.

Plaintiff's contempt motion asks the Court to hold all of the Defendants in contempt for failure to timely answer the complaint as directed by the Court's Order (Doc. No. 17). The service order entered by the Court did, in fact, direct the Defendants to file a timely response. Defendants, however, were not properly served at this point in the litigation. All 13 writs for service (Doc. Nos. 18 - 30) were returned un-executed by the United States Marshals Service on March 15, 2006. This means that service had not been properly effectuated at the time the Motion for Contempt (Doc. No. 32) was filed, and therefore should be denied.

Plaintiff's Motion for Writ of Mandamus (Doc. No. 33) requests the Court enforce the February 21, 2006, Order (Doc. No. 17). The Plaintiff does not seem to understand that the purpose of the order was to direct the Marshals to serve the complaint, which they did. For the Defendants to properly respond to the complaint, they must first be served. Since, as noted previously, the United States Marshals Service filed writs of service un-executed for all of the Defendants, the Court can not force Defendants to comply with an order they never received. The Court did, however, enter a subsequent Order (Doc. No. 34) directing the United States Marshals to re-serve the complaint. Waivers of Service (Doc. Nos. 37- 46) were filed with the Clerk of Court on September 20, 2006, and the Defendants filed an Answer on September 27, 2006. These filings render Plaintiff's request moot. In addition, the Court notes that pursuant to Federal Rule of Civil Procedure 81(b), the writ of mandamus has been abolished. Relief previously available pursuant to this rule is now obtainable via title 28 United States Code § 1361 as an action to compel an officer of the United States to perform his duty. Therefore,

IT IS ORDERED this 16 ~~7~~ day of October, 2006, that Plaintiff's Motion for Contempt (Doc. No. 32) is **DENIED**.

IT IS FURTHER ORDERED that Plaintiff's Motion for Writ of Mandamus (Doc. No. 33) is **DENIED** as moot.

IT IS FURTHER ORDERED that the parties are allowed ten (10) days from this date to appeal this order to a district judge pursuant to Local Rule 72.1.3 B. Failure to appeal within ten (10) days may constitute waiver of the right to appeal.

s/Lisa Pupo Lenihan
Lisa Pupo Lenihan
U.S. Magistrate Judge

cc: Kenneth Fortune
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All counsel of record.